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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. [redacted] 84

THE DAYTON BAR ASSOCIATION,
Respondent,

v.

ROBERT D. KEMPER,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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No. _____

THE DAYTON BAR ASSOCIATION,

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v.

ROBERT D. KEMPER,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

Robert D. Kemper prays that a Writ of Certiorari issue to review the decision of the Supreme Court of Ohio in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio (Appendix A, infra) is reported at 175 O. S. ....

JURISDICTION

The judgment of the Supreme Court of the State of Ohio was entered on November 20, 1963. On November 26, 1963, a motion for re-hearing was filed with the Supreme Court of the State of Ohio, said motion being overruled on December 18, 1963. On March 12, 1964, by order of Mr.

Justice Stewart, the time within which to file the petition for a Writ of Certiorari was extended to and including May 16, 1964. The jurisdiction of this Court is invoked under 28 U. S. C. 1257.

QUESTION PRESENTED

The Petitioner, Robert D. Kemper, an attorney at law, was charged with misconduct as an attorney at law. A hearing was had before the Board of Commissioners on Grievances and Discipline. That Board found that the Petitioner was guilty of certain acts of misconduct as defined by Rule XXVII of the Supreme Court of Ohio and recommended that the Petitioner be permanently disbarred from the practice of law. Between the time of the hearing before the Board of Commissioners on Grievances and Discipline and the date set for the hearing before the Supreme Court of the State of Ohio, the Petitioner was declared by the Probate Court of Montgomery County, Ohio, to be mentally incompetent and was placed in a psychiatric security ward of the Veterans Administration Hospital in Cincinnati, Ohio, with no visitors permitted to see him.

The questions are:

1. Whether the Petitioner received a fair trial or hearing before the Board of Commissioners on Grievances and Discipline because of his mental condition.

2. Whether what was done deprived him of his rights of due process of law as hereinafter set forth.

CONSTITUTION PROVISION INVOKED

Amendment XIV of the Constitution of the United States.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they

reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

STATEMENT

Robert D. Kemper, the Petitioner, is an attorney at law, admitted to practice law in the State of Ohio by the Supreme Court of the State of Ohio. He was charged in a complaint filed by the Dayton Bar Association, with ten specific acts of misconduct. Hearings were held before the Board of Commissioners on Grievances and Discipline at Dayton, Ohio, on December 14, 1961, and on April 17, 1962.

The Board found that Kemper was in fact, guilty of acts of misconduct as defined in Rule XXVII of the Supreme Court of Ohio and was also guilty of violations of the canons of professional ethics of the American Bar Association, and recommended that the Petitioner be permanently disbarred from the practice of law.

At the time of this hearing no evidence was introduced that the Petitioner was mentally ill at the time of the commission of the alleged acts of misconduct or at the time of the hearing before the Board. The Board, in its opinion, stated "The Board found that the mere fact that the statement or statements were made was evidence to the Board that the Petitioner did not have the necessary judgment to be an attorney and counselor of law." Subsequent to that hearing, the Probate Court of Montgomery County, Ohio, issued a commitment finding the petitioner mentally incompetent and he was, at the time of the hearing before the Supreme Court of Ohio, in the psychiatric security ward of the Veterans Administration Hospital in Cincinnati, Ohio.

A certified copy of the finding of the Probate Court of Montgomery County, Ohio, was presented to the Supreme Court of the State of Ohio at the time of the hearing before that august body and a continuance was requested, which was refused, so the Supreme Court of Ohio heard the appeal without his counsel being able to confer with him at all, and all we could do was tell the Court the situation and sit down.

Counsel now representing the petitioner did not represent him at the time of the hearing before the Grievance Committee and so told the Supreme Court of Ohio. We think that the Supreme Court of the United States will be more able to digest the case if we now state what the record shows and so we herewith quote verbatim that record, including the very able dissenting opinion of Judge Herbert.

HERBERT, J., dissenting. The occasion for this dissent arises from the opening sentence of the *per curiam* opinion:

"Upon oral argument, defense counsel suggested that respondent might be mentally ill."

The defense counsel referred to appeared in these proceedings for the first time at the hearing before this court.

The above-quoted observation that respondent "might be mentally ill" is at least a mild understatement.

Respondent was not present at the hearing before this court. He was, at the time, in a psychiatric "security" ward of the Veterans Administration Hospital in Cincinnati upon a commitment issued by the Probate Court of Montgomery County.

There was no formal presentment of evidence of mental affliction before the hearing panel or the Board of Commissioners on Grievances and Discipline, yet the majority opinion recites that, referring to certain statements of the respondent:

"The board found that the mere fact that the statement or statements were made was evidence to the board that the respondent did not have the necessary judgment to be an attorney and counselor of law."

The confused, garbled, rambling and disjointed statements of the respondent found in the record certainly would indicate an abnormal mentality.

Section 1, Rule XXVIII of Rules of Practice of the Supreme Court of Ohio, states that:

"These rules of professional conduct shall be binding upon all members admitted to practice law in the state of Ohio, *and the willful breach* thereof shall be punished by reprimand, by suspension, or by disbarment * * *." (Emphasis ours)

That respondent was mentally ill at the time of the hearing must be conceded. His presence in the veterans hospital under the law of Ohio would have required certain procedure including examination of the respondent by a physician or physicians and their certificates that he was mentally ill.

The commitment by the Probate Court of Montgomery County is further indicia that he was examined by at least one physician who before respondent could be committed would be required to certify that the respondent was mentally ill. It appears to me that there was a prima facie case of mental illness established before this court entered its judgment of permanent disbarment.

The requirement of Section 1, Rule XXVIII of the Rules of Practice of this court, that the court must find that the breach of conduct was "willful," would require at least some further investigation. With but little difficulty, this court could have available the records of physicians, prepared as required by the law of Ohio, that respondent entered the veterans hospital on August 20th, left September 18th, was returned by the Sheriff of Montgomery

County from the jail of that county on September 27th, 1963, and was placed in a "locked" psychiatric ward in the hospital. It would find, I believe, that respondent is and has been suffering from depression reaction—emotional instability.

It could be readily established whether the present mental illness of respondent was of long duration or otherwise.

There is a claim now pending before the Veterans Administration for service-connected disability of the respondent upon the claim that his mental illness is connected with his service in World War II.

I recognize that it is our duty to protect society by exercising the control given this court over members of the bar of Ohio. I recognize also that it is the duty of this court to protect the integrity of the legal profession. I believe also that an accused member of the bar is entitled to certain considerations and rights.

Permanent disbarment brings shame and disgrace upon a member of our profession. In the present state of mind of the respondent, a judgment of indefinite suspension would meet all requirements and responsibilities of this court. An indefinite suspension would place positive control of respondent's relation to the practice of law in the hands and control of this court. Such judgment should be attributed to his mental condition if further investigation warrants such conclusion.

The judgment of this court should be that the respondent be indefinitely suspended from the practice of law by reason of mental illness.

REASONS FOR GRANTING THE WRIT

The reasons for the granting of the writ are:

(a) That Petitioner could not and did not receive a fair hearing before the Board of Commissioners on Grievances

and Discipline, as provided for by the Fourteenth Amendment to the Constitution of the United States.

On December 14, 1961 and on April 17, 1962, hearings were held before the Board of Commissioners on Grievances and discipline concerning alleged acts of misconduct of the Petitioner. The Petitioner, at the time of the hearing, was represented by Counsel and no objection was made to the Petitioner being tried because of his mental incompetence. On September 25, 1963, the Probate Court of Montgomery County, Ohio, found that there was probable causes to believe that Robert Kemper was mentally ill, and he was sent to the Veterans Administration Hospital, Cincinnati, Ohio, a hospital for the mentally ill. This information was supplied to the Supreme Court of Ohio, which Court heard the matter on the report of the Board of Commissioners on Grievances and Discipline, on October 9, 1963. At that hearing a certified copy of the order of the Probate Court of Montgomery County, Ohio, was furnished to the Supreme Court of Ohio. The decision of the Supreme Court of Ohio, is set forth in Exhibit A.

The contention of the Petitioner is that he was mentally incompetent at the time of his hearings before the Board of Grievances and Discipline and, therefore, deprived of due process of law by having been tried before that Board when incapable of making his defense.

(b) That Petitioner was disbarred without due process of law.

In considering the question of due process, two main points present themselves. First, does the guaranty of due process of law, contained in the fourteenth amendment, apply to proceedings aimed at the revocation of an attorney's right to practice his profession? Second, if the due process clause applies, what is necessary to afford the accused attorney such due process?

The answer to question number one is clear; the guaranty of due process embodied in the fourteenth amendment does apply to disbarment proceedings. In *Schlesinger* it was stated that, "The right to practice law is constitutionally protected as a property right and no attorney can lawfully be deprived of such right except by due process of law. . . ." (*In re Schlesinger*, 172 A. 2d 835, 840 (Pa. 1961).)

The Supreme Court long ago classified the practice of law as a property right. In *Ex parte Wall* the Court said that, "(A)n attorney's calling or profession is his property, within the true sense and meaning of the Constitution. . . ." (*Ex parte Wall*, 107 U. S. 265, 289 (1882).)

In *Prouty, et al.* v. *Heron, et al.*, 127 Colorado, 168, 255 Pacific 2nd 755 (1953), a suit was brought by the plaintiff to enjoin the state board of examiners for engineers and land surveyors from classifying qualified engineers as to specific branches of their profession and to correct roster and licensing cards issued by the board to registered engineers and for other relief. The plaintiff had previously been granted a license to practice as an engineer and the state board of examiners for engineers and land surveyors had classified the plaintiff as a "civil engineer" without any court proceeding.

The court stated that the practice of the professions of law, medicine and dentistry are generally considered as learned professions and that the right to practice a learned profession was a "valuable right."

The court further stated at Page 758 "The right to practice such a profession has been recognized as a 'valuable right' or a 'property right' in other jurisdictions." From the case of *Abrams* v. *Jones*, 35 Idaho, 532, 207P724, 727 we quote the following:

> "Where the state confers a license upon an individual to practice a profession, trade, or occupation, such

> license becomes a valuable personal right which cannot be denied or abridged in any manner except after due notice and a fair and impartial hearing before an unbiased tribunal."

In *Smith* v. *Department of Registration in Education, et al.*, 412 Ill. 322, 106 N. E. 2nd 722 (1952), an action was brought by a doctor whose license to practice medicine had been revoked. The court stated at Page 726 "Section 2 of Article II of the Constitution of the State of Illinois reads as follows: 'No person shall be deprived of life, liberty or property without due process of law.' A like provision is found in Amendment 14 of the Constitution of the United States. It has been universally held that a license to practice medicine is a "property right" within the meaning of the constitutional guarantees of due process of law. In the case of *People* v. *Love*, 298 Ill. 304, 131 N. E. 809, 811, 16 ALR 703, the court said:

> "The right to follow either one of these professions (physician or lawyer) is one of the fundamental rights of citizenship. A person's business, profession, or occupation is at the same time "property" within the meaning of the constitutional provisions as to due process of law."

It is stated in Volume 16a of Corpus Juris Secundum, Constitutional Law Section 669 at Page 1069, "Every person has the right to engage in any lawful occupation, trade or calling, and such right is "property" and "liberty" of which one may not be deprived without due process of law, and regulation of such right is justifiable only by the existence of exceptional circumstances. . . ."

Let us now consider the more difficult question of what is necessary to afford the accused attorney such due process. In *Bradley* v. *Fisher* (80 U. S. (13 Wall.) 335 (1871)), the Court noted that the power to remove an attorney from the bar should never be exercised without

notice to the attorney of the grounds of the complaint and ample opportunity for the attorney to be heard. They reasoned that, "*This is a rule of natural justice and is applicable to cases where a proceeding is taken to reach the right of an attorney to practice his profession. . . .*" (Emphasis ours.)

It is necessary that the notice and hearing, generally required in disciplinary actions, must be fair and reasonable, to satisfy the due process requirement.

In, *In re Schlesinger*, 172 A. 2d 835, 840 (Pa. 1961), on appeal to the Supreme Court of the state of Pennsylvania, the order of disbarment was reversed and the case remanded with directions to dismiss the complaint. The Court held that the proceeding violated the requirements of "due process" in that the respondent was not afforded the full, fair and impartial hearing to which he was entitled.

It is also necessary, in addition to the notice and hearing being fair and reasonable, that the defendant in a disciplinary action be competent and sane at the time of the hearing so that he may be able to make a defense at the time of that hearing. If he is not afforded this protection, then there has been a violation of his constitutional right to due process of law. (*State* v. *Davis*, 108 P. 2nd 641, 6 Wash. 2nd 696 (1940).)

The Petitioner herein was in the security ward of the Veterans Administration Hospital at the time of the hearing before the Supreme Court of Ohio. Counsel for the Petitioner was employed by the family of the Petitioner and never had an opportunity to speak with him. Counsel filed a motion with the Supreme Court of Ohio for a continuance of the case so that he might have a chance to speak with the Petitioner during a lucid moment, so that he might properly prepare and argue the case before the Supreme Court of Ohio. This motion for continuance was

denied by the Supreme Court of Ohio and the Petitioner was therefore not afforded his right to have a proper defense in his case made for him.

Judge Herbert in his dissenting opinion from the opening sentence of the per curiam opinion said "Upon oral argument, defense counsel suggested that respondent might be mentally ill," and he goes on to say that the words, 'might be mentally ill' is at least a mild understatement," before the Board that heard the case.

We point out that among the charges made against the Petitioner was one that he offered some money to somebody to murder a person, and another that he offered money to a clerk of the Municipal Court to dispose of some records. We submit, you do not have to be a lawyer to know that those requests are the requests of a diseased brain. We are not citing the other charges in the light of saving time.

Judge Herbert goes on and says, "The board found that the mere fact that the statement or statements were made was evidence to the Board that the respondent did not have the necessary judgment to be an attorney and counselor of law." The reading of the record will show that the statements of the Petitioner were as Judge Herbert said, "The confused, garbled, rambling and disjointed statements of the respondent indicated an abnormal mentality." He further states, "That respondent was mentally ill at the time of the hearing must be conceded," and "It appears to me that there was a prima facie case of mental illness established before this court entered its judgment of permanent disbarment."

What the Petitioner did was not the actions of a normal brain. We particularly call this Court's attention to what Judge Herbert said when he wrote:

> "I recognize that it is our duty to protect society by exercising the control given this court over members

of the bar of Ohio. I recognize also that it is the duty of this court to protect the integrity of the legal profession. I believe also that an accused member of the bar is entitled to certain considerations and rights.

Permanent disbarment brings shame and disgrace upon a member of our profession. In the present state of mind of the respondent, a judgment of indefinite suspension would meet all requirements and responsibilities of this court. An indefinite suspension would place positive control of respondent's relation to the practice of law in the hands and control of this court. Such judgment should be attributed to his mental condition if further investigation warrants such conclusion.

The judgment of this court should be that the respondent be indefinitely suspended from the practice of law by reason of mental illness."

We call attention of the Court to the case of *Stewart* v. *United States*, 275 Fed. 2d 617, reversed on other grounds 366 U. S. 1 (1960), the defendant was charged with first degree murder and robbery of his victim, wherein the principal defense was insanity of the accused who had been found competent to stand trial after appropriate proceedings. The Court stated at page 622 "While it is true that the primary issue is the accused's mental condition at the time of the offence, evidence as to his mental condition at other times becomes relevant when it is related and submitted under proper instructions. Ordinarily the mental condition of the accused at the time of trial may not be shown, and the jury may not be advised that he has been judicially found competent to stand trial. Where the accused has been found competent to stand trial, after appropriate proceedings, and the accused takes the stand and exhibits bizarre symptoms and abnormal behavior, which if truly reflecting his mental state would make a trial legally impossible, we have a different situation. The accused has

then, by his demeanor, put his mental condition as of the time of trial in issue."

In the case of *Fitts* v. *United States*, 284 F. 2nd 108 (1960), the appellant was adjudicated "mentally ill" approximately one month after the commission of a crime for which he was indicted. The Court stated at page 113:

"In *Frame* v. *Hudspeth*, 10 Cir. 109 F. 2nd 356, this court was confronted with the question of whether a general adjudication of insanity after the criminal act, was sufficient to raise the question of insanity and impose upon the court the duty to affirmatively inquire concerning mental capacity of the accused to enter a plea of guilty. The majority thought that the enquiry conducted by the court at bar was sufficient. But the case was reversed upon consent of the Solicitor General, and the cause remanded for the "Purpose of making a full enquiry into the mental status of the petitioner at the time he entered the pleas of guilty." (309 U. S. 632, 60 S. Ct. 712, 84 L. Ed. 989.)

Viewed in this light, it becomes reasonably clear that a diagnosis of mental illness necessitating committment to a mental institution a little more than a month after commission of the crime, is legally sufficient to raise the issue of mental capacity to commit the offense. In any event, we hold that the proof was sufficient to dissipate the presumption of sanity and to inject the issue of insanity as an element of the offense charge. In the absence of competent evidence of criminal responsibility, the accused was entitled to a directed verdict of acquittal."

In the case of *State* v. *Davis*, 108 P. 2nd 641, 6 Wash. 2nd 696 (1940), the court stated at page 650 ". . . If one accused of a crime and put on trial be insane at the time of the trial, his constitutional rights are violated, as an insane person is not capable of defending himself, and if found guilty and the sentence executed, he would be deprived of life or liberty without due process of law.

There has been considerable discussion in court opinions concerned with the matter of disbarment proceedings. These proceedings have been held to be "in its nature civil, and collateral to any criminal prosecution by indictment." (*Ex parte Wall*, 107 U. S. 265, 288; 1882) It has also been said that such proceedings although generally classified as civil, "are never-the-less of a quasi-criminal nature." (*Lenehan* v. *Commonwealth*, 165 Ky. 93, 176 S. W. 948, 954; 1954.)

The testimony given by the Petitioner was evidence of his mental illness at the time of the hearing. When this is tied to the fact that he was declared mentally ill by the Probate Court of Montgomery County, Ohio, subsequent to the hearing, this mental illness as a matter of law would relate back to the earlier hearing date. Even though no testimony was given, this court can take judicial notice of the fact that mental illness is unlike a broken bone, a long developing sickness.

It is the contention of the Petitioner that the fact that the objection was not raised at the time of the hearing before the Board of Commissioners on Grievances and Discipline as to the insanity of the Petitioner at the time of the hearing before the Board, is insignificant. The report of the Board of Commissioners on Grievances and Discipline is a recommendation to the Supreme Court of the State of Ohio, and the Supreme Court was aware of the mental condition of the Petitioner prior to the time of the making of its final decision. They were furnished a certified copy of the finding of the Probate Court of Montgomery County, Ohio at the time of the hearing before the Supreme Court.

In view of the foregoing cases, even though the Petitioner did not formally raise the question of his insanity at the time of the hearing, it was raised by the testimony which he gave and which, as Judge Herbert stated was "confused, garbled, rambling and disjointed."

Subsequent to the time of the raising of the question of the mental incapacity of the Petitioner, to stand trial, the Supreme Court of Ohio modified its rule on disciplinary procedures and included certain rules concerning mental illness as a grounds for suspension of an attorney at law, which prior to that time, were not included as a grounds for suspension.

CONCLUSION

The contention of the Petitioner is that since a disbarment proceeding is of a quasi-criminal type, and since his right to earn a livelihood is as dear as the incarceration of a prisoner, he must be afforded all of the requirements of due process which are afforded to a defendant in such a criminal action. The protection of the due process clause of the constitution of the United States affords the defendant the right to be able to make his defense at the hearing on the charges levied against him.

The Petitioner in this case was tried before the Board of Commissioners on Grievances and Discipline and at the time of that hearing did not object to the hearing because he was at that time insane. Subsequent to that hearing, but prior to the hearing before the Supreme Court of the State of Ohio, the defendant was adjudged mentally incompetent by the Probate Court of Montgomery County, Ohio, copy of which adjudication was filed in the Supreme Court of Ohio, prior to the hearing. Even though no such objection to the hearing was made and no medical testimony was introduced at the time of the hearing before the Board, we can take the testimony of the Petitioner as evidence itself of the mental incapacity of that Petitioner. The subsequent adjudication of incompetency would therefore relate back to the time of the original hearing before the Board, and therefore we can conclude the Petitioner was not afforded due process of law by having been tried while mentally incompetent.

We respectfully submit therefore that the motion for a writ of certiorari in this case be granted.

SIDNEY G. KUSWORM, SR.,
JACOB A. MYERS,
Attorneys for Petitioner.

EXHIBIT A

DAYTON BAR ASSOCIATION v. KEMPER

Attorneys at law—Misconduct—Disciplinary action—Permanent disbarment from practice of law—Acts warranting.

(D. D. No. 38—Decided November 20, 1963.)

ON CERTIFIED REPORT by the Board of Commissioners on Grievances and Discipline.

The relator, the Dayton Bar Association, filed a complaint against the respondent, Robert D. Kemper, Jr., charging him with misconduct as an attorney at law and setting forth ten specific charges of misconduct. A hearing was had before the Board of Commissioners on Grievances and Discipline.

The board found that respondent was guilty of soliciting professional employment to handle a claim for damages for personal injuries, and that the fee charged was excessive, extortionate and not reasonable under the circumstances.

The board found also that respondent undertook to represent a client in a divorce action theretofore commenced by a former associate of respondent who was to get $150 for his services, one-half to be paid by the client and one-half by the client's former husband; and that respondent collected $75 from the client's husband and, without revealing such fact, by threatening an attachment, collected $140 from his client, thus willfully and deliberately collecting a larger fee than was provided for in the contract.

The board found further that respondent contacted an employee of the police department and made an offer of money to her to influence a police officer to drop a certain charge pending against one of respondent's clients; and

that respondent solicited personal employment from a layman claim adjuster for an insurance company and offered to split fees with him and further requested the same adjuster to make payment on an unfounded claim, regardless of liability of the insurance company, and offered to split his fee thus obtained with the adjuster.

The board found further that respondent offered to a certain person the sum of $300 to commit a felony, *i. e.*, to cause bodily injury or death to a female person. The respondent, on the witness stand, did not deny that this female person was "bugging him" but stated that his offer was not made seriously or with any criminal intent. The board found that the mere fact that the statement or statements were made was evidence to the board that respondent did not have the necessary judgment to be an attorney and counselor at law.

The board found that the evidence presented did not support some of the charges filed, but that, from the foregoing findings of fact, the respondent was guilty of misconduct as defined in Rule XXVII of the Supreme Court and of a violation of the Canons of Professional Ethics of the American Bar Association, and recommended that respondent be permanently disbarred from the practice of law.

The matter is now before this court for consideration of the report of the board and the objections of the respondent.

Mr. Robert B. Womsley and *Mr. P. Eugene Smith*, for relator.

Mr. R. James Kemper and *Mr. Sidney Kusworm*, for respondent.

Per Curiam. Upon oral argument in this court, defense counsel suggested that respondent might be mentally ill.

Exhibit A

No suggestion of mental illness was made during the hearings before the board and no proof was offered tending to establish such fact. From a consideration of the record, this court is of the opinion that the board was neither in error nor unreasonable in its findings and recommendation. Although respondent was not personally present during the oral orgument in this court, he testified at the hearing before the board and was represented by counsel at the hearing on the merits and on the objections to the recommendations of the board.

Report confirmed and judgment accordingly.

TAFT, C. L., ZIMMERMAN, MATTHIAS, O'NEILL, GRIFFITH and GIBSON, J.J., concur.

HERBERT, J., dissenting. The occasion for this dissent arises from the opening sentence of the *per curiam* opinion:

"Upon oral argument, defense counsel suggested that respondent might be mentally ill."

The defense counsel referred to appeared in these proceedings for the first time at the hearing before this court.

The above-quoted observation that respondent "might be mentally ill" is at least a mild understatement.

Respondent was not present at the hearing before this court. He was, at the time, in a psychiatric "security" ward of the Veterans Administration Hospital in Cincinnati upon a commitment issued by the Probate Court of Montgomery County.

There was no formal presentment of evidence of mental affliction before the hearing panel or the Board of Commissioners on Grievances and Discipline, yet the majority opinion recites that, referring to certain statements of the respondent:

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"The board found that the mere fact that the statement or statements were made was evidence to the board that the respondent did not have the necessary judgment to be an attorney and counselor of law."

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That respondent was mentally ill at the time of the hearing must be conceded. His presence in the veterans hospital under the law of Ohio would have required certain procedure including examination of the respondent by a physician or physicians and their certificates that he was mentally ill.

The commitment by the Probate Court of Montgomery County is further indicia that he was examined by at least one physician who before respondent could be committed would be required to certify that the respondent was mentally ill. It appears to me that there was a prima facie case of mental illness established before this court entered its judgment of permanent disbarment.

The requirement of Section 1, Rule XXVIII of the Rules of Practice of this court, that the court must find that the breach of conduct was "willful," would require at least some further investigation. With but little difficulty, this court could have available the records of physicians, prepared as required by the law of Ohio, that respondent en-

tered the veterans hospital on August 20th, left September 18th, was returned by the Sheriff of Montgomery County from the jail of that county on September 27th, 1963, and was placed in a "locked" psychiatric ward in the hospital. It would find, I believe, that respondent is and has been suffering from depression reaction—emotional instability.

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